STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2002
v	No. 228731 Arenac Circuit Court
STEPHEN MICHAEL FLEMING, Defendant-Appellant.	LC No. 99-002656-FC

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Defendant Stephen Michael Fleming appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227b. Defendant was sentenced to life in prison for second-degree murder and two years' imprisonment for felony-firearm. We affirm.

Defendant contends that the trial court erred in denying the motion to suppress his inculpatory statements because the officers did not "scrupulously honor" his previously exercised right to remain silent. As an initial matter, we note that defendant's *Walker*[1] hearing addressed only the voluntariness of his confession. Therefore, this issue is forfeited. Nevertheless, defendant may avoid forfeiture of this issue under the plain error rule, by establishing that: (1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, the third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.* Even if the defendant satisfies these three requirements, an appellate court must then exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted only "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993)

Generally, *Miranda* warnings are procedural safeguards required to protect a defendant's right against self-incrimination from the inherently compelling nature of custodial interrogation.

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

Miranda v Arizona, 384 US 436, 444, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Once a person invokes the right to remain silent, interrogation must stop. *Id*. at 473-474, 478-479. Whether statements made after a person has decided to remain silent are admissible depends on whether the right to stop questioning was "scrupulously honored." *Michigan v Mosley*, 423 US 96, 104; 96 S Ct 321; 46 L Ed 2d 313 (1975). To scrupulously honor a person's right to remain silent, the subsequent interrogation must not "have the characteristics of a repeated effort to wear down the resistance of the defendant and make him change his mind." *People v Catey*, 135 Mich App 714, 725; 356 NW2d 241 (1984).

In the instant matter, defendant testified at the *Walker* hearing that he told the lead investigating officer that he did not want to talk about "the homicide." An argument could be made that this statement fell short of an unequivocal assertion of his right to remain silent. See *People v Adams*, 245 Mich App 226, 233-235; 627 NW2d 623 (2001). For example, while executing the search warrant, the police discovered evidence of drug possession. Defendant's statement to the lead investigating officer was certainly not broad enough to prohibit the police from questioning him regarding issues relevant to his drug possession. See *id.*

Even assuming that defendant sufficiently invoked his right to remain silent, we are not persuaded that the police officers failed to "scrupulously honor" this exercise of his rights. Here, other than "small talk," the only comments made by the police officers to defendant followed their discovery of the gun used to commit the instant offense. Accepting defendant's version of the events, these comments were: (i) a mild admonition to "do the right thing" or "get with the program"; and (ii) an inquiry as to whether defendant now wished to talk to the lead investigating officer. As to (i), given defendant's repeated denials of involvement in the instant offense, as well as his general familiarity with the justice system, we are not convinced that these comments were "reasonably likely to elicit an incriminating response," as necessary to be constitute "interrogation." *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998), quoting *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In regard to (ii), we have also recognized that it is appropriate to present new information to an individual so that "an informed and intelligent assessment" of his or her options may be made. *Kowalski, supra* at 475-476, quoting *Mosley, supra* at 102. Again, in the instant matter, the police comments were prompted by the discovery of inculpatory evidence, thereby allowing defendant to make an informed and intelligent re-assessment of his options. Ultimately, we do not believe that these comments were of sufficient quality or quantity to constitute "a repeated effort to wear down the resistance of the defendant and make him change his mind." *Catey, supra* at 725. Thus, we are not persuaded that the police failed to "scrupulously honor" defendant's right to remain silent. *Id.* Therefore, we conclude that the admission of defendant's statements was not plainly erroneous, and that defendant may not avoid forfeiture of this issue.[2] *Carines, supra* at 763.

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[2] We further note that there is an evidentiary basis to support the trial court's finding that defendant was *Mirandized* four times on the day that he made the relevant statements. Although this fact is certainly not dispositive to our resolution of this issue, it does, however, support our conclusion that the police were not attempting to wear down defendant's resistance to questioning.

Defendant also contends that the trial court abused its discretion by not allowing a witness to testify that the victim had "ripped off" drug dealers approximately one week before the victim was murdered. Defendant asserts that this testimony would have corroborated his claims he was afraid of the victim and shot the victim in self-defense. Initially, we note that, contrary to defendant's claims, this issue is not a constitutional issue because defendant was allowed to present his self-defense claim at trial. Indeed, defendant had already testified when the instant evidentiary dispute arose. Instead, this is an evidentiary issue that is within the trial court's discretion and, therefore, reviewed for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Generally, all relevant evidence is admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Relevant evidence is evidence that is material and probative, meaning the evidence is logically relevant to, and has any tendency to prove, an issue or fact of consequence at trial. MRE 401; *Starr*, *supra* at 497-498.

To assert a self-defense claim, a defendant must honestly and reasonably believe there is an imminent danger of serious bodily harm or death. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). If evidence is used to show the defendant's state of mind and support his apprehensions, the defendant must have known of the evidence. *People v Harris*, 458 Mich 310, 317; 583 NW2d 680 (1998). Here, defendant's knowledge of the victim's alleged theft from drug dealers was based on the victim's statements, not the witness's statements. In fact, defendant testified that, at the time of the incident, he did not know anything about the victim's propensity for violence. In other words, to whatever extent defendant had knowledge of the victim's prior conduct, it was not based whatsoever on the excluded evidence. Accordingly, we fail to see how the proposed testimony was relevant to defendant's specific assertion of self-defense.

Further, even where character evidence of a homicide victim is admissible pursuant to MRE 404(a)(2), MRE 405(a) limits the introduction of this evidence on direct examination to "testimony as to reputation or by testimony in the form of an opinion." It is only during cross-examination that the inquiry may delve into specific acts. MRE 405(a). Thus, even if the proposed witness had been allowed to testify, his testimony on direct examination could not have referenced the victim's alleged robbing of crack dealers. In fact, defendant did properly present the testimony of two witnesses suggesting that the victim had a reputation for violence. Under MRE 405(a), this is the proper method of establishing a character trait or propensity, such as violence. Consequently, we are not persuaded that the trial court abused its discretion by excluding the proposed testimony.[3]

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[3] In addition, we would note that defendant's testimony was damaging to his claim of self-defense, suggesting that, even if the proposed testimony was erroneously excluded, the error was harmless. For example, defendant testified that he had an opportunity to drive "probably sixty yards" away from the victim, before turning around to attempt to pacify the victim. Moreover, defendant testimony's established that the victim approached him menacingly at a "steady walk"; however, defendant testified that he had sufficient time to retrieve the shotgun from his truck, load the shotgun with bullets that were in his pocket, and then warn the victim to stop at least twice before shooting him. Although defendant claimed that the shooting was "self-defense," he

(continued…)

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper

(…continued)

testified that he shot the victim twice. Further, defendant testified that the victim was not armed with any weapons as he approached defendant; nevertheless, defendant testified that he shot the victim in the face and head. In light of defendant's testimony, we believe that there was an ample basis for the jury to conclude that defendant's use of deadly force was unreasonable, regardless of the victim's history of robbing crack dealers or defendant's honest belief that those stories were true.